BASIL S. BOLSTRIDGE
ELIZABETH W. BOLSTRIDGE

IBLA 84-809 Decided December 10, 1985

Appeal from decision of the Anchorage District Office, Alaska, Bureau of Land Management, declaring placer mining claims null and void ab initio. AA-23118 and AA-23119.

Affirmed as modified.

1. Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally -- Mining Claims: Lands Subject to -- Regional Corporation Selections

   The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

2. Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally -- Mining Claims: Lands Subject to -- Regional Corporation Selections

   In the absence of a Master Title Plat or other appropriate land use record entry depicting that a Native regional corporation selection was filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), which, under authority of 43 CFR 2653.2(d), segregates the selected lands from any other appropriation, it was improper for the Bureau of Land Management to invoke the notation rule as a bar to mining claims located during the pendency of the Native selection.

3. Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally -- Mining Claims: Lands Subject to -- Regional Corporation Selections

> Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

APPEARANCES: Basil S. Bolstridge and Elizabeth W. Bolstridge, pro sese.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Basil S. and Elizabeth W. Bolstridge have appealed from a decision of the Anchorage District Office, Alaska, Bureau of Land Management (BLM), dated July 17, 1984, declaring the Big Jim and the Little Jim Claim Fraction placer mining claims (AA-23118, AA-23119) null and void ab initio.

The above claims were located on November 2, 1978, and location notices therefor were filed with BLM on November 27, 1978. The claims lie within protracted T. 5 N., R. 4 W., Seward Meridian, Alaska. More specifically, they are located in the W 1/2 of the NE 1/4 of sec. 36, along the Kenai River.

The lands within T. 5 N., R. 4 W., Seward Meridian were encompassed in two selection applications filed by Cook Inlet Region, Inc. (CIRI), a Native regional corporation formed under authority of section 7 of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. §§ 1601, 1606 (1982). The applications, AA-8098-36 and AA-11153-21, were filed December 16 and December 18, 1975, respectively. BLM's July 17, 1984, decision notes that while both these regional corporation selections were invalid, at the time appellants' mining claim location notices were filed, the official records of BLM reflected the pendency of the two CIRI selection applications and that under the "notation rule," these record notations barred any other appropriation of the land, citing this Board's decision in Paiute Oil & Mining Corp., 67 IBLA 17 (1982).

[1] Implicit in BLM's decision is that the filing of a regional corporation selection triggers an immediate segregative effect. Thus, regardless of whether the application is void or voidable, its notation on the Master Title Plat (MTP) is deemed to perpetuate the segregation. However, as recently explained in David Cavanagh, 89 IBLA 285 (1985), it is not the case that all regional corporation selection applications segregate the lands affected thereby upon filing of the application. ANCSA provides for the selection and conveyance of lands to Native regional corporations in three separate ways. Section 12(a)(1) (43 U.S.C. § 1611(a)(1) (1982)) entitles regional corporations to select the subsurface estate of certain lands withdrawn for selection by section 11(a) of the Act (43 U.S.C. § 1610(a) (1982)) when a village corporation within the region selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Number 4. Section 12(c)(3) (43 U.S.C. § 1611(c)(3) (1982)) is the principal selection authority for regional corporations. It provides:

> (3) Before the end of the fourth year after the date of enactment of this Act, each Regional Corporation shall select the acreage allocated to it from the lands within the region withdrawn pursuant to subsection 11(a)(1), and from the lands within the region withdrawn pursuant to subsection 11(a)(3) to the extent lands withdrawn pursuant to subsection 11(a)(1) are not sufficient to satisfy its allocation: Provided, That within the lands withdrawn by subsection 11(a)(1) the Regional Corporation may select only even numbered townships in even numbered ranges, and only odd numbered townships in odd numbered ranges.

Nothing in section 12(a)(1) or 12(c)(3) of the Act shows a Congressional intention that the mere filing of a regional corporation selection application thereunder shall segregate the lands affected from any other appropriation under the public land laws, including the mining and mineral leasing laws. As the Board held in Cavanagh, supra, the Department's implementing regulations for regional corporation selections under section 12(a)(1) and 12(c)(3), found at 43 CFR Part 2650, Subpart 2652 (Regional Selections), also fail to attribute a segregative effect to the filing of such applications. Inasmuch as section 11(a)(1) and 16(a) expressly withdrew lands eligible for Native village and regional corporation selection from any other appropriation, the preservation of such lands for Native use only, subject to valid existing rights, would seem to be adequately protected under ANCSA's withdrawal provisions.

In Cavanagh, supra, the regional corporation selection at issue was invalid because it included lands that were not eligible for selection. In the absence of statutory or regulatory authority that segregated all lands affected by the application from any other appropriation, the Board held that the notation rule could not be invoked as an independent ground for declaring the subject lands ineligible for entry by mining claimants.

In addition to selection rights over lands withdrawn by Congress, section 14(h) of the Act, 43 U.S.C. § 1613(h) (1982), permits regional corporations, among others, to obtain title to lands withdrawn by the Secretary from 2 million acres of unreserved and unappropriated lands located outside the areas withdrawn by sections 11 and 16 of the Act. Thus, section 14(h)(1) authorizes the Secretary to withdraw and convey to regional corporations fee title to existing cemetery sites and historical places. Under section 14(h)(2)(3) and (5), regional corporations are eligible to receive the subsurface estate to lands withdrawn and conveyed by the Secretary to Native groups and to individual Natives as primary places of residence. And, under section 14(h)(8), regional corporations are entitled to portions of the 2 million acres withdrawn by the Secretary under section 14 that remain unconveyed under other subsections. The Department's implementing regulations for the above are set forth at 43 CFR Part 2650, Subpart 2653, entitled Miscellaneous Selections. These regulations contain a provision expressly segregating the lands applied for under section 14(h) "from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws." 43 CFR 2653.2(d).

The decision appealed from does not state whether the regional corporation selections involved in this case were filed under section 12 or 14 of ANCSA. However, AA-8098-36 was before the Board in Cavanagh. Based on

documents of record in Cavanagh, we found the foregoing CIRI selection to have been filed under section 12 of the Act. We take official notice of that fact in this adjudication. Selection application AA-11153-21 has also been the subject of prior adjudication. By decision dated December 27, 1978, the Alaska Native Claims Appeals Board affirmed BLM's rejection of this CIRI selection, which the decision explains was filed under both section 12 and 14 of ANCSA. ANCAB # RLS 78-2.

While the record furnished the Board does not contain a MTP for T. 5 N., R. 4 W., Seward Meridian, Alaska, dated contemporaneously with the filing of appellants' mining claim location notices, it does contain a copy of an MTP dated August 1978 (3 months before appellant's location) that notes the two regional corporation selection applications at issue as follows: "AA 8098-36 Reg/Sel ApLn within Chugach NF" and "AA 1115321 Reg/ Sel ApLn Entire TP."

[2] A blueprint for how a case of this nature should be decided appears in Judge Burski's separate concurring opinion in Cavanagh. Judge Burski stated:

> I recognize that an argument could be made that it is generally impossible to establish from the status records whether a regional selection is made under sections 12(a)(1), 12(c), or 14(h) of ANCSA. This being the case, how would the notation rule apply where the status records merely showed that a regional selection had been made? Would it be presumed to be under section 12(a)(1) or 12(c) such that no segregation could be imputed or under section 14(h) with the result that a segregation would be assumed?
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> In candor, this question appears to be unique in the history of the application of the notation rule. The reason for this is simply that, in the past, a specific application either did or did not have a segregative effect. To my knowledge, the regulations promulgated for regional selections are the first that have ever treated some selections as segregating the land and others of the same type as not resulting in a segregation. The problem that arises is that in the absence of a notation on the status entries relating to the statutory basis for the regional selection it becomes impossible to determine whether or not the selection segregates the land from subsequent appropriation. In my view, the notation rule simply cannot apply in such circumstances.
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> I have already noted my agreement with the majority that a conflict in notations removes the basis for the application of the notation rule, which is that the public has a right to rely on the status records of the Department, even when they are erroneous. Thus, when the records conflict, the notation rule cannot operate to independently foreclose an appropriation not substantively foreclosed, since the factual premise of the rule, viz., that the records put people on clear notice, cannot be shown to exist. Similarly, with respect to regional selections, where the status records fail to note the statutory basis of the selection there is no reason to impute knowledge to all subsequent

> appropriators that the application segregates since it may or may not. Thus, I would hold that absent identification of the statutory basis for the regional selection on the status records, there is no basis for invoking the notation rule.
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> It may be that the application was, in fact, made under section 14(h) of ANCSA. In such a case, the land might well be deemed not to be available, but this would result from the substantive segregation effected by 43 CFR 2653.2(d), not the notation rule. An individual who proceeds to initiate an appropriation of land in the face of conflicting notations runs the risk that the attempted appropriation may be defeated if, in fact, the land is actually withdrawn or segregated. So, too, an individual who attempts to initiate rights in lands embraced on a regional selection faces the prospect that, should it be ultimately determined that the land was sought under section 14(h) of ANCSA and that such applications do, indeed, segregate the land, all of his efforts will avail him nothing. But it is the actual segregation effected by the selection which will defeat him and not its notation on the status records. [Emphasis in original.]

The Board accepts the above postulates set forth by Judge Burski as the logical course to follow in discerning the legal effect of CIRI's section 14(h) land selection on appellants' mining claims. Thus, in the absence of an MTP or other land use record entry depicting that AA-11153-21 was filed under authority of section 14 of the Act or 43 CFR Subpart 2653, it was improper for BLM to invoke the notation rule as a bar to appellants' claims.

[3] However, the mere filing of CIRI selection AA-11153-21 independently served to segregate the lands affected thereby from any other appropriation to the extent said application entailed selections filed under section 14 of ANCSA and 43 CFR Subpart 2653. See 43 CFR 2653.2(d).

Appellants' claims are barred by the filing of the above application even though it was ultimately rejected by BLM in July 1978 on grounds upheld by ANCAB in its December 1978 decision, viz., that the section 14(h) claim for cemetery and historical sites failed to meet documentation and physical description requirements of 43 CFR 2653.5 (f). No argument has been made to the Board that this CIRI selection application was not "regular on its face" when filed, such that under our decision in John C. and Martha W. Thomas (On Reconsideration), 59 IBLA 364 (1981) (involving a State selection application), no segregative effect should be inferred. Id. at 367. Here, it was not until ANCAB adjudicated CIRI's appeal from BLM's rejection of the application that it was a matter of finality that the selection was invalid.

In light of the above, BLM's rejection of appellants' mining claim location notices should have been on the grounds that at the time of the filing of their notices, the land in T. 5 N., R. 4 W., Seward Meridian, Alaska, was segregated from any other appropriation of the land by virtue of a pending Native regional corporation selection filed in part under authority of section 14(h) of ANCSA.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Wm. Philip Horton
Chief Administrative Judge

We concur:

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Gail M. Frazier
Administrative Judge

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C. Randall Grant, Jr.
Administrative Judge